IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JOHN DOE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 1:17-cv-00401-TSE-MSN**
	)	
MARYMOUNT UNIVERSITY, LINDA McMURDOCK, and JANE ROE,	)	
	)	
Defendants.	)	

PLAINTIFF JOHN DOE'S BRIEF IN RESPONSE TO THE UNIVERSITY DEFENDANTS' MOTION TO DISMISS

Plaintiff John Doe[1] submits this Brief in Response to Defendant Marymount University's and Defendant Linda McMurdock's (together, the "University Defendants") motion to dismiss the claims against them under Federal Rule of Civil Procedure 12(b)(6). For the reasons set out below, this Court should deny the motion in its entirety and permit Mr. Doe's claims against the University Defendants to proceed to discovery.

PRELIMINARY STATEMENT

Mr. Doe's Complaint sets out five claims against the University Defendants: a claim of gender discrimination under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, and four claims under Virginia's common law—one for breach of contract, one for breach

[1] John Doe is not Plaintiff's real name, nor is Jane Doe the real name of the defendant whose sexual assault allegations against Mr. Doe are the basis for this action. Mr. Doe filed, contemporaneously with his Complaint, a Motion for Leave to Proceed Under Pseudonym and for a Protective Order, in order to keep their real names out of the public record. See ECF No. 2. The Motion remains pending before this Court.

of the covenant of good faith and fair dealing, a negligence claim, and a claim alleging violations of the law of associations.[2]

Each of these claims arises out of Marymount's investigation and adjudication of Defendant Roe's allegation that Mr. Doe sexually assaulted her—an allegation that is not only demonstrably false but also physically impossible. See Compl., ¶¶ 9, 99, 235. As Mr. Doe specifically alleges in his Complaint, Ms. Roe told University investigators that Mr. Doe "put his fist up her vagina *while she was standing up*," which "even if possible could not have been done without serious, verifiable injury." Compl., ¶ 9.[3] And only an hour after this incident—which, if true, could only be fairly characterized as a violent sexual assault—Defendant Roe (1) sent Mr. Doe a text message, in response to his message asking about her plans for the evening, stating "I'm eating pizza haha," Compl., ¶ 6; and (2) "happ[ily]" and "gidd[ily]" bragged to her roommate and another friend about the hickeys she had received from Mr. Doe, boasting that "Mr. Doe was good with his tongue," Compl., ¶¶ 6, 104, 106.

Throughout Marymount's investigation of Defendant Roe's allegations, Mr. Doe repeatedly implored the investigators to obtain evidence that could easily confirm or refute Defendant Roe's claims, such as medical evidence that a fist had been put up Defendant Roe's vagina while she was standing, or evidence that Defendant Roe had visited with a counselor after the alleged assault as she claimed. See Compl., ¶¶ 119-120, 123, 127, 132, 135, 141. The investigators not only failed to obtain this evidence, they made no effort to do so despite Mr.

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[2] Mr. Doe's Complaint also sets out a defamation claim against Defendant Jane Roe (Count VI), which is not at issue in the University Defendants' motion to dismiss.

[3] In their Memorandum, the University Defendants attempt to minimize the sheer impossibility of Ms. Roe's account by characterizing what she claimed Mr. Doe did as "struck her with his fist in her vagina." Defs.' Mem. at 10. But that is not what Mr. Doe alleges; he alleges that Ms. Roe told University investigators that he "put his fist *up* her vagina." Compl., ¶ 9 (emphasis added).

Doe's repeated requests. Id. And while the investigators did, at Mr. Doe's insistence, obtain the exculpatory text messages and interview the witnesses who spoke to Defendant Roe's "happy" and "giddy" behavior in the hours after the alleged violent sexual assault, the adjudicator, Donald Lavanty, inexplicably refused to consider any of this evidence, see Compl., ¶¶ 147-151.

In spite of all of this—the impossibility of Defendant Roe's claims; the lack of any medical records to support Defendant Roe's impossible claims; the overwhelming evidence that Defendant Roe acted "happy" and "giddy" in a way no person would right after being violently assaulted; and the irrefutable evidence that Defendant Roe had lied to investigators—Marymount found Mr. Doe responsible for sexual assault and suspended him for two academic years. See Compl., ¶ 21.

Mr. Doe alleges—quite simply, and quite plausibly in light of his specific allegations above—that Marymount and its Title IX Coordinator, Defendant McMurdock, railroaded him throughout the investigative and adjudicative process. Among a host of glaring procedural deficiencies, Mr. Doe alleges that the University's investigators and adjudicator ignored exculpatory evidence, such as text messages strongly suggesting that Defendant Roe did not suffer the violent sexual assault she alleged, see Compl., ¶ 147; that they refused to seek out evidence that would have shown Defendant Roe's allegations to be false, see Compl., ¶ 141; and that they made every effort to hinder Mr. Doe from defending himself by, for example, forbidding him to contact possible witnesses, see Compl., ¶¶ 250-252.

And Mr. Doe's Complaint alleges facts that strongly suggest *why* Marymount railroaded him: to satisfy the Department of Education's Office for Civil Rights ("OCR"), Marymount's student body, and the general public—in the midst of a nationwide moral panic concerning sexual assault on college campuses—that male students accused of sexual assault by female students would be found responsible and punished. See Compl., ¶¶ 16-17, 184.

Rather than confront these and other allegations in Mr. Doe's complaint head-on, the University Defendants sound a familiar tune, seeking to recast his allegations as mere "dissatisf[action]" with the University's decision to find him responsible. Defs.' Mem. at 14. But as Mr. Doe noted at the very outset of his Complaint, that is not what his lawsuit is about. See Compl. ¶¶ 1-2. To be sure, he alleges that he is innocent of the allegations, as he is and as he must to obtain the relief he seeks: vacatur and expungement of the erroneous finding from his permanent educational records. But his Title IX claim *also* alleges facts supporting his claim that the University's actions were motivated by gender bias. And his state law claims all seek relief not on the grounds that the University's decision was merely *wrong*, but that it was entirely *arbitrary, malicious, discriminatory, and otherwise in bad faith*.

Accordingly, this Court need not fear—as the University Defendants invite it to—that Mr. Doe's claims will turn the federal courts into "super-administrator[s] and policy maker[s] at a private University," Defs.' Mem. at 14, any more than it fears that employment discrimination claims under Title VII of the Civil Rights Act of 1964 have turned the federal courts into a "super-personnel department weighing the prudence of employment decisions made by firms charged with employment discrimination." DeJarnette v. Corning Inc., 133 F.3d 293, 298 (4th Cir. 1998) (quoting Giannopoulos v. Brach & Brock Confections, Inc., 109 F.3d 406, 410 (7th Cir. 1997)). Like well-pled Title VII claims do in employment cases, Mr. Doe's Complaint challenges the discriminatory *motivation* for the University's disciplinary decisions—not the *prudence* of those decisions (apart, of course, from showing that the University's proffered rationale was pretextual). And Mr. Doe's Complaint alleges, loud and clear, that the

University's motivation was not to reach a correct decision based on the evidence, but rather to find a male student responsible for sexual assault *regardless of the evidence*.

If the University Defendants are right that such allegations are not sufficient to state a claim under Title IX or Virginia's common law, then students at Virginia private universities have no remedy for even the most arbitrary and discriminatory actions taken against them—even though the stakes, in terms of the reputational harm caused by a university's finding of responsibility for sexual assault, are the same no matter whether a student attends a public or private university. Thankfully for private school students in Virginia, such allegations do make out cognizable claims for the reasons set out below.

STANDARD OF REVIEW

When reviewing a motion to dismiss under Rule 12(b)(6), a court must "accept as true all of the factual allegations contained in the complaint." E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 440 (4th Cir. 2011). The court must also "draw all reasonable inferences in favor of the plaintiff," id., granting a motion to dismiss only where "it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." Priority Auto Grp., Inc. v. Ford Motor Co., 757 F. 3d 137, 139 (4th Cir. 2014). While a complaint must "provide enough facts to state a claim to relief that is plausible on its face," Robinson v. Am. Honda Motor Co., Inc., 551 F.3d 218, 222 (4th Cir. 2009), a plaintiff alleging gender discrimination under Title IX benefits at the pleading stage from a "temporary presumption" of discrimination, such that, for purposes of the satisfying the element of gender discrimination under Title IX, a complaint is sufficient "if it pleads specific facts that support a ***minimal*** plausible inference of such discrimination," Doe v. Columbia Univ., 831 F.3d 46, 56 (2d Cir. 2016) (emphasis added).

ARGUMENT

I. MR. DOE HAS SUFFICIENTLY STATED AN ERRONEOUS OUTCOME CLAIM UNDER TITLE IX.

In Count I, Mr. Doe alleges that the University violated Title IX by intentionally discriminating against him on the basis of his gender.

As the University Defendants acknowledge, see Defs.' Mem. at 14-15, federal courts around the country, including this Court, have recognized the "erroneous outcome" theory of Title IX liability set out by the Second Circuit in Yusuf v. Vassar College, 35 F.3d 709 (2d Cir. 1994).[4] See, e.g., Doe v. Rector & Visitors of George Mason Univ., 132 F. Supp. 3d 712, 732 (E.D. Va. 2015) (Ellis, J.) (noting that "[t]his 'erroneous outcome' theory of Title IX liability has been widely accepted").[5] Under this theory, a student may bring a claim alleging that, as a result

[4] The University Defendants also discuss whether Mr. Doe's Complaint sufficiently states a "selective enforcement" claim under Yusuf. See Defs.' Mem. at 17-18. Mr. Doe's Complaint, however, does not press such a claim—which "asserts that, regardless of the student's guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by the student's gender," Yusuf, 35 F.3d at 715. Accordingly, selective enforcement is not discussed further in this Response.

[5] In George Mason University, this Court dismissed a student's erroneous outcome claim for failure to "allege facts sufficient to support an inference of gender-motivated discrimination." 132 F. Supp. 3d at 733. But the student-plaintiff's complaint in George Mason University lacked many of the allegations upon which Mr. Doe's claim of gender discrimination rests. For example, unlike Mr. Doe, the student in George Mason University made no allegations regarding pressure from OCR, the student body, or the general public. Compare 132 F. Supp. 3d at 733 n.27 (noting that the student's complaint "does not allege any facts suggesting that plaintiff [was] being singled out as a man to make a point to the Office for Civil Rights"), with Compl., ¶ 184 (alleging that "Marymount University has been under significant pressure—from OCR, its student body, and the public-at-large—to vigorously punish male students accused of sexual assault by female students"), and Compl., ¶ 107 (alleging that Marymount's Deputy Title IX Coordinator, Aline Orfali, told Mr. Doe's parents at the outset of the University's investigation of Defendant Roe's allegations that "the Title IX process is increasingly politicized, especially in Virginia."). And unlike Mr. Doe, the student in George Mason University did not allege that "pertinent university officials" made statements suggesting their gender bias. Compare 132 F. Supp. 3d at 733 & n.29 (comparing the student's complaint unfavorably with the student in Doe v. Washington & Lee Univ., No. 6:14-cv-52, 2015 WL 4647996, at *10 (W.D. Va. Aug. 5,

of gender bias, "he was innocent and wrongfully found to have committed an offense." Yusuf, at 35 F.3d at 715. A student-plaintiff sufficiently states such a claim where he alleges (1) "particular facts sufficient to cast some articulable doubt on the outcome of the disciplinary proceeding," and (2) "particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding." Id.

The University Defendants only halfheartedly argue that Mr. Doe has not alleged sufficient facts to cast doubt on the University's finding. See Defs.' Mem. at 16 (merely asserting, without any citation or discussion of other cases, that "[Mr. Doe's] primary argument in this regard is that his story is more believable than [Defendant Roe's] and that the four University officials responsible for assessing the parties' respective stories got it wrong when they believed [Defendant Roe's] account of the sexual encounter instead of his."). A cursory review of Yusuf and the allegations in Mr. Doe's Complaint suffices to explain why the University Defendants devote so little attention to this first element of an erroneous outcome claim.

As the Second Circuit explained in Yusuf, "the pleading burden" with respect to the first element, "is not heavy." 35 F.3d at 716. It may be satisfied by "alleg[ing] particular evidentiary weaknesses behind the finding of an offense such as a motive to lie on the part of a complainant or witnesses, particularized strengths of the defense, or other reason to doubt the veracity of the charge. A [student-plaintiff's] complaint may also allege particular procedural flaws affecting the proof." Id.

2015), in which a pertinent university official had "endorsed an article positing that men similarly situated to the plaintiff were in fact guilty of sexual assault"), with Compl., ¶¶ 187-192 (alleging comments by the adjudicator in Mr. Doe's case, Donald Lavanty, suggesting he is biased against male students).

Mr. Doe's Complaint sails over this low bar. Mr. Doe has not only alleged that Defendant Roe's story was *weak*, but that her account of what Mr. Doe did to her—"put his fist up her vagina while she was standing up"—is "*impossible*, and even if possible, could not have been done without serious, verifiable injury." Compl., ¶¶ 9, 99, 235. Mr. Doe has not only alleged that Defendant Roe had a *motive* to lie, but that she *demonstrably lied* to the University's investigators about when she sent a text message to Mr. Doe that undermined her claim that she had been violently assaulted. See, e.g., Compl., ¶ 108 (alleging that "Ms. Roe lied to investigators," by telling them that she sent a text message to Mr. Doe, stating "I'm eating pizza haha," *before* the alleged assault, when the timestamp on the message showed that she, in fact, sent it about an hour *after* the alleged assault). And Mr. Doe has alleged a litany of serious procedural flaws affecting the proof—including, but by no means limited to, (1) the Adjudicator's failure to meet with Mr. Doe face-to-face to allow him to plead his case, relying instead on a cold record, despite the central significance of credibility in the case, Compl., ¶¶ 2, 13, 142-145, 169; and (2) the Adjudicator's unexplained refusal to consider exculpatory evidence apart from Mr. Doe's and Defendant Roe's own accounts about what happened during their encounter, such as Defendant Roe's text message to Mr. Doe stating "I'm eating pizza haha" only about one hour after she alleges he violently assaulted her and witness testimony that Ms. Roe was "giddy" and "happy" and bragging about how Mr. Doe was "good with his tongue" in the hours after she says Mr. Doe violently assaulted her, Compl., ¶¶ 146-151.[6] As courts have repeatedly found in recent years, such allegations are more than sufficient to meet the low burden set by the first element. See, e.g., Doe v. Brown Univ., 166 F. Supp. 3d 177, 187 (D.R.I. 2016) (noting that the first prong of Yusuf was satisfied where the university "ignored exculpatory

[6] Paragraph 207 of Mr. Doe's Complaint summarizes these and many other serious procedural deficiencies in the case, which are also described throughout Mr. Doe's Complaint.

evidence, including the victim's own testimony"); Doe v. Washington & Lee Univ., No. 6:14-cv-52, 2015 WL 4647996, at *10 (W.D. Va. Aug. 5, 2015) (noting that the first element had been satisfied where the student-plaintiff had "allege[d] a host of flaws in [the university's] handling of his case, ranging from critical omissions in what [the investigators] included in the witness summaries, to the [adjudicative body's] failure to consider evidence of . . . [a] post-incident sexual encounter").

The heart of the University Defendants' Title IX argument, though, regards the second element of an erroneous outcome claim—whether Mr. Doe's complaint sufficiently alleges circumstances suggesting gender bias. See Defs.' Mem. at 16-17. But here, too, the University Defendants err by ignoring the factual, provable allegations in Mr. Doe's Complaint that suggest not only bias, but bias on the basis of gender. Moreover, the University Defendants fail to heed the pleading standard applicable to a motion to dismiss under Rule 12(b)(6)—specifically, the standard as applied by the federal courts in recent Title IX decisions.

The most important of these recent decisions is the Second Circuit's opinion in Doe v. Columbia University, 831 F.3d 46 (2d Cir. 2016). In Columbia University, the Second Circuit held that, in assessing whether a student-plaintiff has pled sufficient facts to plausibly suggest gender bias (thus satisfying the second element of an erroneous outcome claim), a court must bear in mind the minimal amount of *evidence* of gender bias needed to make out a prima facie case of discrimination. Id. at 53-56 (holding that the burden-shifting framework set out by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), for employment discrimination cases under Title VII of the Civil Rights Act of 1964, applies to claims of gender discrimination under Title IX).[7] As the Second Circuit explained, the McDonnell Douglas framework creates a "temporary presumption" of discrimination that "reduces the plaintiff's pleading burden" at the motion to dismiss stage. 831 F.3d at 56. Thus,

> a complaint under Title IX, alleging that the plaintiff was subjected to discrimination on account of sex in the imposition of university discipline, is sufficient with respect to the element of discriminatory intent, like a complaint under Title VII, if it pleads specific facts that support a ***minimal*** plausible inference of such discrimination.

Id. (emphasis added); accord Neal v. Colo. State University-Pueblo, No. 1:16-cv-873, 2017 WL 633045, at *15 (D. Colo. Feb. 2, 2017) (recommendation of magistrate judge; objection pending) (approving of "Columbia's pleading standard" and rejecting the university's argument that the decision was "an outlier").

Applying this discrimination-specific pleading standard, the Second Circuit in Columbia University reversed the district court's dismissal of the student's erroneous outcome claim. See 831 F.3d at 57-58 (rejecting the district court's reasoning that "any bias in favor of [the female complainant] 'could equally have been—*and more plausibly was*—prompted by lawful, independent goals,'" and noting that the pleaded facts need not make "discriminatory intent . . . *the most plausible* explanation of the defendant's conduct. It is sufficient if the inference of discriminatory intent is plausible." (emphasis in original)).

[7] While, as far as undersigned counsel is aware, neither the Fourth Circuit nor this Court has addressed whether the McDonnell Douglas burden-shifting framework applies to Title IX cases, the Second Circuit's decision in the affirmative was based on the principle, "made clear in Yusuf," that "Title VII cases provide the proper framework for analyzing Title IX discrimination claims," Columbia University, 831 F.3d at 55-56. This principle has been embraced by the Fourth Circuit. See Preston v. Commonwealth of Va. ex rel. New River Cmty. Coll., 31 F.3d 203, 207 (4th Cir. 1994) ("Title VII, and the judicial interpretations of it, provide a persuasive body of standards to which we may look in shaping the contours of a private right of action under Title IX.").

Mr. Doe's Complaint alleges a number of provable, non-conclusory facts from which—in the aggregate—a reasonable factfinder could draw this "minimal plausible inference" of gender discrimination required to overcome a motion to dismiss. Such facts fall, generally, into one or more of three categories recognized by Title IX decisions as suggesting gender bias: (1) "statements by pertinent university officials," Yusuf, 35 F.3d at 715; (2) "patterns of decision-making that . . . tend to show the influence of gender," id.; and (3) allegations suggesting that the university sought to punish male students to alleviate pressure being exerted on the university by the government, the media, or the public, see, e.g., Wells v. Xavier Univ., 7 F. Supp. 3d 746, 752 (S.D. Ohio 2014) (holding that a male student sufficiently stated an erroneous outcome claim where, in addition to a number procedural and evidentiary shortcomings, the complaint alleged that the university had made the male student a scapegoat in order to placate OCR).

Turning to the specific facts in Mr. Doe's Complaint suggesting gender bias, Mr. Doe alleges that the University adjudicator who found him responsible for sexual assault, Donald Lavanty, asked a question—while serving as a University investigator in a subsequent case against another male Marymount student—that suggests that he is biased against males and in favor of females. See Compl., ¶¶ 186-192. As specifically alleged in Mr. Doe's Complaint, this subsequent case involved a female student who had accused a male student of sexual misconduct. See Compl., ¶ 187. Defendant McMurdock assigned Mr. Lavanty as one of the University's two investigators in the matter. During an interview conducted by Mr. Lavanty and the other investigator, this male student claimed that the female complainant had, in fact, assaulted him by repeatedly touching his genitals without his consent and by repeatedly pushing his hand into her genitals without his consent. Compl., ¶¶ 186-187. Mr. Lavanty's response to the male student's allegation was to ask whether the male student was "aroused" by the female's actions. Compl., ¶ 188. And when the male student responded that he was not, Mr. Lavanty expressed incredulity, asking "Not at all?" Compl., ¶ 189. And tellingly, Mr. Lavanty asked these questions despite being trained by the University that physical arousal resulting from sexual activity should not inform a conclusion as to whether such sexual activity was consensual. See Compl., ¶ 191.

A reasonable factfinder could infer from Mr. Lavanty's questions that he was more apt to believe a *female's* allegation of sexual assault against a male, than a *male's* allegation of sexual assault against a female. Cf. Doe v. Williams Coll., No. 2:16-cv-30184, slip op. at 2-3 (D. Mass. Apr. 28, 2017) (denying a university's motion to dismiss a student's Title IX where the student alleged that "he was himself a victim of harassments, and even a physical assault, by the party he was alleged to have victimized," and that "his own complaints of harassment were treated with less seriousness than the alleged victim's complaints and that responsible administrators were more solicitous of her because of her gender than of him"). The University Defendants appear to offer no argument as to why such an inference is not reasonable—other than to note that Mr. Doe does not explain how "hiring an investigator in *a subsequent case* constitutes particularized evidence of gender bias *in his case*." Defs.' Mem. at 16. But that explanation is obvious: a person's sexual biases, like his racial ones, tend not to change; a person who holds a gender bias in one case against a male can reasonably be inferred to bring that same bias to another matter involving another male. And indeed, Mr. Lavanty made this comment less than a year after rendering his decision in Mr. Doe's case. See Compl., ¶ 145 (noting that Mr. Lavanty rendered his decision on June 22, 2016, less than a year ago).

Mr. Doe also alleges that, in the same subsequent sexual assault case against another male student, the University appointed an OCR attorney to serve as an investigator, despite the attorney's comment strongly suggesting that she would prejudge the guilt of students accused of sexual assault. See Compl., ¶¶ 194-195 (noting that the University appointed Olabisi Okubadejo, who had recently finished a six-year tenure as an OCR attorney, despite knowing that she had publicly commented that "most people who complain about sexual assault are telling the truth"). Though Ms. Okubadejo did not serve as an investigator in Mr. Doe's case, the University Defendants' decision to appoint her suggests a pattern of decisionmaking at Marymount; a factfinder could reasonably infer that the University appointed Ms. Okubadejo to serve as an investigator in this subsequent case—knowing about her bias against accused students—in order to secure more convictions of male students accused of sexual assault. And likewise, a factfinder could reasonably infer that Defendant McMurdock knew about Mr. Lavanty's bias against male students at the time she appointed him to serve as the adjudicator in Mr. Doe's case, and appointed him regardless of this bias in order to secure a finding that Mr. Doe was responsible for sexual assault. See Compl., ¶ 90 (alleging, on information and belief, that Defendant McMurdock was the person who made the decision to appoint Mr. Lavanty to serve as the adjudicator in Mr. Doe's case). Courts facing motions to dismiss erroneous outcome claims have commonly held similar patterns of decisionmaking to raise a plausible inference of gender bias. See, e.g., Doe v. Ohio State Univ., No. 2:16-cv-171, 2017 WL 951464, at *17 (S.D. Ohio Mar. 10, 2017) (denying motion to dismiss male student's erroneous outcome claim where the student showed a "pattern of anti-male gender bias"); cf. also, Neal, 2017 WL 633045, at *14 (noting that an inference of anti-male gender bias was supported by, among other allegations, an allegation that the investigative report in the student-plaintiff's case referenced allegations of misconduct by other male students in unrelated cases).

In addition to these facts about Mr. Lavanty's and Marymount's actions in the subsequent case, Mr. Doe alleges a number of provable facts suggesting that the University Defendants' actions in all of its cases of sexual assault against male students are motivated by a desire to avoid criticism by OCR, the student body, and the public at large by punishing male students accused of sexually assaulting female students. Federal courts have consistently recognized that such allegations—when coupled with other allegations suggesting gender bias—can nudge a claim of gender discrimination across the line from merely possible to minimally plausible. See, e.g., Doe v. Salisbury Univ., 123 F. Supp. 3d 748, 768 (D. Md. 2015) (denying university's motion to dismiss accused students' Title IX claims where the students "also allege[d] that 'upon information an belief'" the defendants took the actions that they did "to demonstrate to the United States Department of Education and/or the general public that [they] are aggressively disciplining male students accused of sexual assault," and citing Washington & Lee Univ., 2015 WL 4647996, at *10, as an example of a decision "finding that similar allegations of government pressure to convict male students—paired with other allegations of gender bias—supported a plausible claim for erroneous outcome discrimination"); see also Collick v. William Patterson Univ., No. 16-cv-471, 2016 WL 6824374, at *11-12 & n.12 (D.N.J. Nov. 17, 2016) (denying a university's motion to dismiss an accused student's Title IX claims where the student alleged that "universities were under pressure to make a show of compliance with Title IX following [OCR's issuance of its 2011 "Dear Colleague Letter"]," and noting that "[a]llegations that a university was under government pressure may add plausibility to an otherwise-conclusory allegation of bias"); Doe v. Lynn Univ., No. 9:16-cv-80850, 2017 WL 237631, at *5 (S.D. Fla.

Jan. 19, 2017) (denying a university's motion to dismiss a student's Title IX claim, and noting that, though national pressure may not be sufficient in itself, such "allegations are . . . another pebble on the scale").

Similarly to what the students alleged in these cases, Mr. Doe's Complaint alleges that Marymount has been under pressure from OCR—as well as from the student body and the general public—to vigorously punish male students accused of sexual assault by female students. See Compl., ¶ 184 (noting that Marymount has been under such pressure for several years). And contrary to the University Defendants' assertion that Mr. Doe "alleges [such pressure] in conclusory fashion," and "does not show how [the pressure] affected the adjudication of his particular case," Defs.' Mem. at 16, Mr. Doe alleges specific, provable facts that contribute to a reasonable inference that Marymount was aware of such pressure, and that it was a motivating factor behind the biased investigation and adjudication that erroneously found him responsible for sexual assault. Mr. Doe discusses the facts that support these two inferences below.

As to how this pressure was brought to bear on Marymount, Mr. Doe alleges that (1) OCR has launched investigations into some 300 colleges and universities nationwide; and (2) the national media has published innumerable reports that sexual assaults committed by males against females pervade college campuses. See Compl., ¶ 210.

And as to how such pressure affected Mr. Doe's case, Mr. Doe has specifically alleged facts suggesting that pertinent Marymount officials were acutely aware of such pressure at the time of the investigation and adjudication of Mr. Doe's case. Most strikingly, Mr. Doe alleges that, during a meeting between his parents and the University's Deputy Title IX Coordinator, Aline Orfali, to discuss the impending investigation of Defendant Roe's allegations, Ms. Orfali stated that "the Title IX process is increasingly politicized, especially in Virginia." Compl., ¶

107. A factfinder could reasonably infer that the "politiciz[ation]" Ms. Orfali was referring to was the pressure Marymount was under from OCR, the student body, and the public at large to convict male students accused of sexual assault by females students. Cf. Collick, 2016 WL 6824374, at *12 (noting, in denying a university's motion to dismiss a student's Title IX claim for lack of adequate allegations of gender bias, that "it is no more than a commonsense inference that the public's and policymakers' attention to the issue of campus sexual assault may have caused a university to believe it was in the spotlight"). These specific allegations about Marymount's awareness of substantial pressure to convict male students set Mr. Doe's Complaint apart for those cited by the University Defendants in their Memorandum. See, e.g., Doe v. Cummins, 662 F. App'x 437, 452 (6th Cir. 2016) (holding that the student's allegations that the university discriminated against him to "appease" OCR were insufficient to raise a plausible inference because—unlike Mr. Doe's allegations in this case—the allegations were "mere conclusory statements, unsupported by sufficient factual allegations")[8]; Doe v. Baum, No. 16-cv-13174, 2017 WL 57241, at *24-25 (E.D. Mich. Jan. 5, 2017) (holding that a student's allegations about a "toxic climate" on campus were not sufficient to support a plausible inference of gender bias because the specifically alleged events creating the allegedly toxic climate, including news articles, occurred—unlike the allegations of public pressure in this case—several years before the student-plaintiff was disciplined for sexual assault by the university).

In sum, Mr. Doe's erroneous outcome claim relies not on conclusory allegations of gender bias, as the University Defendants contend it does, but on provable facts, including, but by no means limited to, (1) Mr. Lavanty's statements showing bias against male students in a

[8] Indeed, Neal specifically distinguishes Cummins as a case in which the student-plaintiff only alleged "generic pressure" from OCR without specific facts—such as a deputy Title IX coordinator's statement that the school's Title IX process was "increasingly politicized"—to render the allegations more than simply conclusory. See 2017 WL 633045, at *16.

subsequent case; (2) the University's appointment of a biased investigator, Ms. Okubadejo, in the same subsequent case; and (3) Ms. Orfali's comments in Mr. Doe's case that the Title IX process at Marymount is "increasingly politicized," along with allegations that Marymount has, for several years, been under substantial pressure from OCR, its student body, and the public.

One final point bears mentioning: the University Defendants contend that Mr. Doe's "conclusory 'on information and belief' allegations grasp at straws and simply do not carry his burden." Defs.' Mem. at 17. But allegations made "upon information and belief" are not only permissible, but common in discrimination cases such as these, where—at the pleadings stage of the case, before discovery has been conducted—a plaintiff simply does not have access to the information that will ultimately be needed to prove discrimination. See Brown Univ., 166 F. Supp. 3d at 190 (noting that "[t]he fact that . . . allegations are pled 'upon information and belief' does not . . . make them improper," and that "[t]his manner of pleading 'is a permissible way to indicate a factual connection that a plaintiff reasonably believes is true but for which the plaintiff may need discovery to gather and confirm its evidentiary basis'" (quoting Salisbury Univ., 123 F. Supp. 3d at 768)); Ritter v. Okla. City Univ., No. 16-cv-438, 2016 WL 3982554, at *2 (W.D. Okla. July 22, 2016) (denying a university's motion to dismiss a student's Title IX claim despite "sparse" allegations of gender discrimination, and noting that "[t]his [was] the type of case for which 'information and belief' pleading was designed. It is highly unlikely that the defendant would or possibly could willingly disclose the factual information it criticizes plaintiff for not alleging in his complaint.").

As these and other Title IX decisions recognize—and as courts considering employment discrimination claims under Title VII have long recognized—few discrimination defendants are foolish enough to make "smoking gun" evidence of discrimination publicly available. Most people who discriminate do not come right out and say they're discriminating. And universities can cite educational privacy laws to prevent a student from obtaining materials related to other students' adjudications (which materials could assist a student in demonstrating a pattern of gender discrimination), and can even—as the University Defendants did in this case—cite such laws to restrict a student's access to materials *related to his own case*, see Compl., ¶¶ 174-183 (alleging that, following the University's final decision in Mr. Doe's disciplinary matter, Defendant McMurdock refused to provide him even a redacted copy of the investigative report, erroneously citing educational privacy laws as an excuse). Courts have not failed to see the dilemma—to say nothing of the injustice—that would be imposed upon such students by requiring them to point to conclusive evidence of gender discrimination at the motion to dismiss stage, before discovery is available to them. See, e.g., Brown Univ., 166 F. Supp. 3d at 187-188 (noting that "the best information for discerning whether alleged discrimination was based on the plaintiff's gender . . . is generally in the possession of the defendant," rejecting the position that a Title IX claim must be dismissed "absent some smoking gun evidence set forth in the complaint," and explaining that to "[r]equir[e] . . . a male student [to] conclusively demonstrate, at the pleading stage, with statistical evidence and/or data analysis that female students were treated differently, is both practically impossible and inconsistent with the standard used in other discrimination contexts"); Marshall v. Ind. Univ., 170 F. Supp. 3d 1201, 1210 (S.D. Ind. 2016) (rejecting university's motion to dismiss a student's Title IX claim, and explaining that defendants "cannot have it both ways, restricting access to the facts and then arguing that [the plaintiff's] pleading must be dismissed for failure to identify more particularized facts. Instead, whether the facts alleged sufficiently ultimately support a claim for intentional gender discrimination under Title IX is a question for a later stage in this litigation, after fair and robust discovery by both sides.”).

To be sure, Mr. Doe may be unable at *summary judgment* to carry his burden of producing evidence sufficient to create a genuine issue of fact as to whether the University discriminated against him on the basis of his gender. Such is the fate of many discrimination claims, including erroneous outcome claims under Title IX, see, e.g., Doe v. Boston Coll., 15-cv-10790, 2016 WL 5799297, at *24-26 & n.7 (D. Mass Oct. 4, 2016) (granting university-defendant summary judgment on student’s erroneous outcome claim, and noting that because “the parties have reached the summary judgment stage . . . [the student] must demonstrate a genuine issue of material fact, not merely allegations of a plausible inference of gender bias”). But this is not summary judgment. At this early stage of the case, Mr. Doe need only allege facts that, if proven, would give rise to a minimally plausible inference of gender discrimination. He has adequately done so.

II. MR. DOE HAS SUFFICIENTLY STATED A CLAIM FOR BREACH OF AN IMPLIED CONTRACT WITH MARYMOUNT UNIVERSITY AND FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING ENCOMPASSED BY THAT CONTRACT.

In Counts II and III of Mr. Doe’s Complaint, Mr. Doe sets out claims against the University for breach of contract and for breach of the covenant of good faith and fair dealing, respectively.

The University Defendants’ argument as to why this claim should be dismissed attacks a straw man that Mr. Doe alleges nowhere in his complaint: that the University’s Sexual Harassment and Interpersonal Misconduct Policy constitutes a contract and that its prescribed policies and procedures constitute the terms of this contract. As the University Defendants amply demonstrate, federal courts applying Virginia contract law have almost unanimously rejected that proposition. See Defs.' Mem. at 19-20 (citing cases).[9]

But in Counts II and III of his Complaint, Mr. Doe alleges something different: he alleges that Mr. Doe paid tuition in consideration for access to the University's undergraduate program, doing so from the time he first enrolled in August 2014, through the time he was suspended from the University for sexual assault. Compl., ¶¶ 25, 214. As a result, he alleges that he and Marymount entered into an implied contract, under which Marymount had a duty "not to suspend [him] for disciplinary misconduct arbitrarily, capriciously, maliciously, discriminatorily, or otherwise in bad faith." Compl., ¶¶ 213-217. Such allegations suffice to allege the existence of an implied contract.

Under Virginia law, an "implied-in-fact" contract may exist, "even though no oral or written agreement was executed between the parties." Spectra-4, LLP v. Uniwest Commercial Realty, Inc., 772 S.E.2d 290, 293-294 (Va. 2015) (noting that "some of the terms and conditions [of such contracts] are implied . . . from the conduct of the parties.") (quoting Hendrickson v. Meredith, 170 S.E. 602, 605 (1933)). Such a contract "is arrived at by a consideration of [the parties'] acts and conduct." Spectra-4, LLP, 772 S.E.2d at 295. Thus, in Spectra-4, LLP, the Virginia Supreme Court held that an implied-in-fact contract existed where, for twelve years, one party, Uniwest, managed commercial buildings owned by two other parties, Spectra-4 and Spectet, and, in exchange for providing these management services, received a monthly fee paid by Spectra-4 and Spectet. Id.

Just as Uniwest provided services to Spectra-4 and Spectet, Marymount University provided services (access to its undergraduate degree program) to Mr. Doe and other Marymount students. And just as Spectra-4 and Spectet compensated Uniwest regularly for its management

[9] Mr. Doe agrees with the University Defendants that Virginia law governs Mr. Doe's state law claims set out in Counts II through VI. See Defs.' Mem. at 13.

services at regular intervals, so did Mr. Doe compensate Marymount at regular intervals (through tuition payments) for access to his classes. Therefore, an implied-in-fact contract exists between Marymount and Mr. Doe.

While undersigned counsel is aware of no Virginia Supreme Court decisions finding the existence of an implied-in-fact contract between a student and his college or university, there is support for the proposition that such a contractual relationship exists under Virginia law. See Krasnow v. Va. Polytechnic Inst. & State Univ., 414 F. Supp. 55, 56 (W.D. Va. 1976) ("[S]tudents enrolled in state supported institutions acquire a contractual right for the period of enrollment to attend, subject to compliance with scholastic and behavioral rules of the institution, and to dismissal for violation thereof, provided the dismissal was not arbitrary or capricious."); Helton v. Univ. of Richmond, 2 Va. Cir. 254 (City of Richmond, 1985) (granting injunction to university student "whether . . . on the basis of contract, the law of associations or a duty to comply with the procedures it represents will be afforded as a matter of fairness"); see also Butler v. Rector & Bd. of Visitors of Coll. of William & Mary, 121 F. App'x 515, 521 (4th Cir. 2005) ("Assuming the [college] had a contract with [the student] it did not breach that contract by expelling [the student] . . . .").[10] And there is *little, if any,* support in law or policy for the categorical rule the University Defendants seem to suggest: that an implied-in-fact contractual relationship can never exist between a student and his college or university. Defendants claim that such a proposition is supported by Abbas v. Woleben, No. 3:13-cv-147, 2013 WL 5295672, at *4 (E.D. Va. Sept. 19, 2013). See Defs.' Mem. at 20 (arguing that Abbas "considered and explicitly rejected an argument that the payment of tuition entitled the plaintiff to some amorphous set of contractual expectations"). But this vastly overstates the breadth of the following two sentences from the Abbas decision, the remainder of which was devoted to whether various documents, such as the university's student handbook, created an enforceable contract:

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[10] Cases from states other than Virginia have recognized an implied contractual relationship between a student and his college or university. See, e.g., Papelino v. Albany Coll. of Pharm. of Union Univ., 633 F.3d 81, 93 (2d Cir. 2011) ("Under New York law, an implied contract is formed when a university accepts a student for enrollment: if the student complies with the terms prescribed by the university and completes the required courses, the university must award him a degree." (citing New York cases)); Kashmiri v. Regents of Univ. of Cal., 67 Cal. Rptr. 3d 635, 649 (Cal. Ct. App. 2007) (holding that, in the absence of "formal agreements between the students and the University" there were "implied-in-fact contracts"); Lemmon v. Univ. of Cincinnati, 750 N.E.2d 668, 670 (Ohio Ct. Cl. 2001) ("A contract is formed between a student and a university when a student enrolls at the university, pays tuition, and attends classes.").

> Similarly, the general statement that "Plaintiff offered to attend school and pay tuition and the school accepted Plaintiff's offer, admitted him and received tuition payment therefore" does not support a claim that later dismissing the plaintiff qualifies as a breach of contract. Despite enrolling and paying tuition, people flunk out of school all the time.

2013 WL 5295672, at *4. Fairly read, this holds no more than that the university had not *breached* a contract with the student, assuming one existed, because a university may "flunk out" a student for poor academic performance under the hypothetical contract's terms. The Abbas decision contains no reasoning regarding the consideration or conduct of the parties—as there was in the Virginia Supreme Court's Spectra-4, LLP decision—that would suggest that the Court was considering squarely the question of whether there was an implied-in-fact contract.

The University Defendants' argument finds no more support in policy than it does in the law. Indeed, if there can be no implied contractual relationship between a student and his private college or university, what prevents the college or university from arbitrarily dismissing the student, for no reason whatsoever and with no refund of tuition or any other form of compensation? Nothing, the University Defendants would have to reply, other than an institution's own benevolence. That cannot be right. But it is exactly what the University Defendants are arguing, even if they might not want to admit it. If there is no implied contract between a student and his private college in Virginia, an administrator could walk up to a second-semester senior and expel him on the spot because he didn't like his shoes. And, according to the University Defendants' logic, that student would have literally no legal recourse under Virginia law.

Virginia law on implied-in-fact contracts solves this problem. Mr. Doe's payment of tuition in exchange for access to Marymount's undergraduate program created an implied-in-fact contract.[11] And accordingly, such a contract includes an implied duty of good faith and fair dealing, which Virginia law reads into all contracts. See, e.g., Stoney Glen, LLC v. S. Bank & Trust, 944 F. Supp. 2d 460, 466 (E.D. Va. 2013) (holding that "Virginia does recognize an implied duty of good faith and fair dealing in common law contracts," which duty prevents a party from "act[ing] arbitrarily or unfairly" in the exercise of that party's discretion"). As Mr. Doe alleges in his Complaint, the University Defendants violated this duty "by suspending [him] for sexual misconduct that—in the ways, and for the reasons, set out above—was arbitrary, capricious, malicious, discriminatory, and conducted in bad faith." Compl., ¶¶ 218, 223. Accordingly, Mr. Doe has stated a claim for a breach of contract and a breach of the covenant of good faith and fair dealing.

III. MR. DOE HAS SUFFICIENTLY STATED TORT CLAIMS FOR NEGLIGENCE AND VIOLATIONS OF DUTIES OWED UNDER THE LAW OF ASSOCIATIONS.

In Counts IV and V, Mr. Doe sets out tort claims under Virginia law. In Count IV, Mr. Doe raises a negligence claim against both of the University Defendants, Marymount University

[11] While the University Defendants do not address, in their motion to dismiss, what the relevant terms of the implied-in-fact contact are, Mr. Doe's Complaint alleges that, under the terms of the implied contract, "Marymount has a duty not to suspend Mr. Doe for disciplinary misconduct arbitrarily, capriciously, or otherwise in bad faith." Compl., ¶ 217. Such terms are consistent with those described in Krasnow, 414 F. Supp. at 56 ("[S]tudents enrolled in state supported institutions acquire a contractual right for the period of enrollment to attend, subject to compliance with scholastic and behavioral rules of the institution, and to dismissal for violation thereof, provided the dismissal was not arbitrary or capricious.").

and Linda McMurdock. In Count V, Mr. Doe raises a claim under the law of associations against Defendant Marymount University.

Before turning to the law surrounding these claims, it is worth addressing the University Defendants' admonition that "federal courts 'rule upon state law *as it exists* and do not surmise or suggest its expansion.'" Defs.' Mem. at 21-22 (quoting Burris Chem., Inc. v. USX Corp., 10 F.3d 243, 247 (4th Cir. 1993) (emphasis added by University Defendants)). True enough, but that does not mean that federal courts are bound to give an unfairly narrow view of the state's common law, or to permit a claim to proceed only where a case from the state's highest court is directly on point and approves of such a claim. As the United States Supreme Court has explained:

> A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. **In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court** . . . . State law is to be applied in the federal as well as the state courts and **it is the duty of the former in every case to ascertain from *all* the available data what the state law is and apply it . . . .**

West v. Am. Tel. & Tel. Co., 311 U.S. 223, 236–37 (1940) (emphasis added). To do otherwise would be to deprive a litigant who has sued in federal court the right to have his state law claims adjudicated in the same way that a state court would. That is all Mr. Doe seeks here: for his state law tort claims to be assessed fairly in light of Virginia state law, as ascertainable from all of the available data about what the state law actually is.

A. Count IV – Negligence

In Count IV, Mr. Doe alleges that the University Defendants had—and breached—a "duty to Mr. Doe to exercise reasonable care, with due regard for the truth, an evenhanded application of procedure, and the important and irreversible consequences of [their] actions."

Compl., ¶ 227-228. The University Defendants argue that Mr. Doe's claim must be dismissed because no Virginia cases recognize "a legal duty of care owed by a university and its employees to a student in the context of a student disciplinary proceeding." Defs.' Mem. at 21.

While Defendants are correct that there appear to be no Virginia cases directly addressing Mr. Doe's specific formulation of the duty, the Virginia Supreme Court has generally noted that a legal duty arises in a person when that person's conduct "create[s] a recognizable risk of harm to the other individual, or *to a class of persons—as for example, all persons within a given area of danger*—of which the other is a member." RGR, LLC v. Settle, 764 S.E.2d 8, 19 (Va. 2014) (emphasis in original). And a duty may arise in officials who have a special relationship, not to the public at large, but to a "specific identifiable person or class of persons." Burdette v. Marks, 421 S.E.2d 419, 421 (Va. 1992). Where such a special responsibility exists, a duty may arise from the "particular factual circumstances in a given case." Thompson ex rel. Thompson v. Skate Am., Inc., 540 S.E.2d 123, 127 (Va. 2001).

Given these guidelines for determining whether certain duties of care exist, the Virginia Supreme Court would likely hold that university officials have the requisite special relationship with students charged in disciplinary proceedings and that "the important and irreversible consequences" of an adverse disciplinary finding give rise to a duty to the accused student. See Compl., ¶ 227. This is particularly likely given that courts outside of Virginia have confronted the question and found such a duty. See, e.g., Doe v. Univ. of the South, 4:09-CV-62, 2011 WL 1258104 at *21 (E.D. Tenn. 2011) (denying a university summary judgment on a student's negligence claim and noting that "a jury could find that the harm caused by the University's allegedly and arguably haphazard implementation of its own Sexual Assault Policies was foreseeable, especially where here . . . the harm was severe: a wrongful conviction by a disciplinary committee"); Rollins v. Cardinal Stritch Univ., 626 N.W.2d 464, 470 (Minn. Ct. App. 1981) ("[W]e hold that common law imposes a duty on the part of private universities not to expel students in an arbitrary manner.").

The University Defendants' alternative argument—that "the negligence claim against Linda McMurdock in her individual capacity should also be dismissed because plaintiff's complaint contains no allegation that [she] acted outside of the court and scope of her duties as Title IX Coordinator," Defs.' Mem. at 22—is without merit. "It has been long settled in Virginia that 'employers and employees are deemed to be jointly liable and jointly suable for the employee's wrongful act.'" VanBuren v. Grubb, 733 S.E.2d 919, 923 (Va. 2012) (quoting Thurston Metals & Supply Co. v. Taylor, 339 S.E.2d 538, 543 (Va. 1986); see also Miller v. Quarles, 410 S.E.2d 639, 642 (Va. 1991) ("Both principal and agent are jointly liable to injured third parties for the agent's negligent performance of his common law duty of reasonable care under the circumstances.").

B. Count V – Law of Associations

In Count V, Mr. Doe alleges that Marymount had—and breached—a duty to Mr. Doe, under the law of associations, (1) not to suspend him for sexual misconduct "on a record that was devoid of evidence to support the charge"; (2) not to suspend him for sexual misconduct "through an investigatory and adjudicative process that is arbitrary, capricious, malicious, discriminatory, or conducted in bad faith"; and (3) "to follow its own policies and procedures" in investigating and adjudicating Defendant Roe's allegations. Compl., ¶¶ 234, 236, 238. As with Mr. Doe's negligence claim set out in Count IV, the University Defendants argue that Mr. Doe's law of associations claim must be dismissed because Virginia law does not recognize "a right by a student against a university under any law of associations." Defs.' Mem. at 23.

While the University Defendants are correct that there appears to be only one Virginia case noting the potential applicability of the law of associations *in the specific context of a challenge to a university disciplinary proceeding*, see Defs.' Mem. at 22-23 (citing Helton, 2 Va. Cir. at 254), the University Defendants fail to address other Virginia cases that discuss the contours of the law of associations in analogous contexts. Virginia courts have recognized duties under the law of associations in cases involving other types of private organizations, such as private membership organizations. See Corrigan v. N. S. Skirmish Ass'n, Inc., No. 14616, 1994 WL 1031211, at *2 (Va. Cir. Ct. Loudoun Cnty. June 9, 1994) (addressing a lawsuit challenging the decision of an association of Civil War reenactors to expel one of its members for cheating during a competition, and holding that the court could review the decision under the law of associations). In Corrigan, the court explained that the law of associations allows for judicial review "of limited scope," in which "the Court may not substitute its judgment for that of the [association]," but may determine:

> (1) whether the record is devoid of any evidence to support the charge, (2) whether the [association] acted in bad faith or with malice in disciplining [the member], or (3) whether the [association] failed to follow the procedures set forth in the [association's] By-Laws in its consideration of the charges against [the member].

1994 WL 1031211, at *2.

If the law of associations under Virginia law permits judicial review of a decision of a group of Civil War reenactors to expel one of its members, it is hard to imagine that at least the same degree of judicial review is not available to private university students facing a serious misconduct charge such as sexual assault—a finding that can result not merely in expulsion, but also in life-shattering reputational harm caused by inclusion of the finding in a student's permanent educational records.

Given the limited judicial review that Virginia law recognizes for disciplinary proceedings under the law of associations in other contexts, and "the important and irreversible consequences" of an adverse disciplinary finding , see Compl., ¶ 227, there is little reason to doubt that the Virginia Supreme Court would hold that the law of associations permits judicial review of disciplinary proceedings along the limited lines set out in Corrigan. This is particularly likely given that courts outside of Virginia have applied the law of associations in this way. See, e.g., Harvey v. Palmer Coll. of Chiropractic, 363 N.W.2d 443, 444 (Iowa Ct. App. 1984) (holding that "a private university may not expel a student arbitrarily, unreasonably, or in bad faith," and noting that this conclusion follows from "several legal theories, including . . . the law of associations").[12]

CONCLUSION

Mr. Doe's Complaint is not, as the University Defendants have tried to recast it, a trumped-up request for a do-over. Nor does it consist of mere disagreements with the University's credibility determinations or minor quibbles about the University's policies. Rather, Mr. Doe alleges all of the following:

- That Ms. Roe told University investigators that Mr. Doe "put his fist up her vagina *while she was standing up*," which "even if possible could not have been done without serious, verifiable injury." Compl., ¶ 9.

[12] See also Tedeschi v. Wagner Coll., 404 N.E.2d 1302, 1304 (N.Y. 1980) (reversing a private college's suspension of a student for disruptive behavior in violation of the college's rules, and holding that "whether by analogy to the law of associations, on the basis of a supposed contract between university and student, or simply as a matter of essential fairness . . . when a university has adopted a rule or guideline establishing the procedure to be followed in relation to suspension or expulsion that procedure must be substantially followed"); Napolitano v. Trustees of Princeton Univ., 453 A.2d 263, 272-275 (N.J. Super. Ct. App. Div. 1982) (holding, in a lawsuit in which the student challenged a private university's decision to withhold her degree on the basis of its finding that she committed plagiarism, that both contract principles and the "law of private associations" allowed a court to "review the evidence" to determine whether it was "sufficient to support the charge of plagiarism").

- That only an hour after allegedly suffering this violent sexual assault at the hands of Mr. Doe, Defendant Roe sent Mr. Doe a text message, in response to his message asking about her plans for the evening, stating "I'm eating pizza haha," Compl., ¶ 6.

- That when the University's investigators asked Defendant Roe about this text message to Mr. Doe, she lied, stating that she sent it before her encounter with Mr. Doe, when—as the University's investigators knew from the message's time stamp—she sent it *after* the encounter. Compl., ¶ 108.

- That two of Defendant Roe's friends, who saw her in the hours after the alleged violent sexual assault, told University investigators that Defendant Roe was "happ[ily]" and "gidd[ily]" bragging about the hickeys she had received from Mr. Doe, and was boasting that "Mr. Doe was good with his tongue." Compl., ¶¶ 6, 104, 106.

- That the University investigators refused to make any effort—despite Mr. Doe's repeated requests that they do so—to obtain medical evidence that would confirm or refute Defendant Roe's already implausible claim that Mr. Doe put his entire fist in her vagina while she was standing up. Compl., ¶¶ 119-120, 123, 127, 132, 135, 141.

- That the University Adjudicator appointed to decide whether or not Mr. Doe sexually assaulted Defendant Roe, Mr. Lavanty, would not meet with Mr. Doe face-to-face to allow him to plead his case before rendering a decision, despite the critical importance of credibility to the allegations. Compl., ¶¶ 2, 13, 142-145, 169.

- That Mr. Lavanty refused to consider the fact that Defendant Roe sent a text message to Mr. Doe about an hour after he allegedly assaulted her saying "I'm eating pizza haha"; refused to consider that Defendant Roe had lied to investigators about when she had sent that message; and refused to consider statements from Defendant Roe's friends about how, in the hours after the alleged assault, she was happily and giggly boasting about her encounter with Mr. Doe. Compl., ¶¶ 147-151.

- That the University's Adjudicator, Mr. Lavanty—while serving as an investigator in another case in which a male was accused of sexual assault by a female student, less than a year after adjudicating Mr. Doe's case—asked a question that suggested that he thought males were more likely to commit sexual assault than female students. Compl., ¶¶ 186-192.

- That the University appointed an OCR attorney, Ms. Okubadejo, to serve as an investigator in a case against another male student accused of sexual assault by a female student, despite knowing that Ms. Okubadejo had publicly made a comment that "most people who complain about sexual assault are telling the truth." Compl., ¶¶ 193-195.

- That the University's Deputy Title IX Coordinator, Ms. Orfali, told Mr. Doe's parents at the outset of the University's investigation of Defendant Roe's allegations that "the Title IX process is increasingly politicized, especially in Virginia." Compl., ¶ 107.

These facts make it clear that Mr. Doe's case is not merely one in which a student simply lost a swearing contest with another student. Rather, these facts—taken together—strongly suggest an investigative and adjudicative process intended to railroad Mr. Doe into a finding of responsibility for sexual assault. And the facts strongly suggest a *motive* for this railroading: to mollify public pressure from OCR, the student body, and the general public by finding responsible and punishing a male student accused of sexual assault by a female student.

As several opinions issued by the federal courts over the last few years have shown, these sorts of facts are more than sufficient to state a claim under Title IX. And Virginia's common law provides other viable causes of action in which Mr. Doe can challenge the University's disciplinary proceeding as arbitrary, discriminatory, malicious, or otherwise brought in bad faith.

Accordingly, the University Defendants' motion should be denied in full, and Mr. Doe's claims against the University Defendants should proceed to discovery.

Dated: May 9, 2017

Respectfully submitted,

_/s/___________________________________
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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2017, the foregoing Brief in Response to the University Defendants' Motion to Dismiss was served on all counsel of record and registered users via the court's electronic filing system.

__/s/___________________________
Adam R. Zurbriggen